BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

IN THE MATTER OF	)	
	)	
TARIFF FILING REQUIREMENTS FOR NONDOMINANT CARRIERS	)	**CC DOCKET NO. 93-36**
	)	

TO: THE COMMISSION

COMMENTS OF CAPITAL CITIES/ABC, INC. AND NATIONAL BROADCASTING COMPANY, INC.

Capital Cities/ABC, Inc. and National Broadcasting Company, Inc. (hereinafter "the Networks"), by their attorneys, hereby file these initial comments in response to the Notice of Proposed Rulemaking issued by the Commission on February 19, 1993.[1/]

I. BACKGROUND

The Commission released the Notice in this proceeding in the wake of the D.C. Circuit's November 1992 AT&T v. FCC decision, which held unlawful the FCC's "permissive forbearance" policy that had allowed nondominant carriers to refrain from filing tariffs.[2/] In the Notice, the Commission tentatively concludes that, now that all nondominant carriers must file tariffs, the public interest would be served by "streamlining, to the maximum extent possible consistent with our statutory obligations, our

---

1/ In the Matter of Tariff Filing Requirements for Nondominant Common Carriers, Notice of Proposed Rulemaking, CC Docket No. 93-36, issued February 19, 1993 ("Notice").

2/ 978 F.2d 727 (D.C. Cir. 1992).

tariff regulation of all domestic nondominant carriers."[3/] One major proposal is to shorten the tariff notice period for nondominant carriers from fourteen days to one day.[4/] The Notice states that a fourteen day notice period will have "an anticompetitive impact on nondominant carrier competition" in the post-AT&T environment because it "delays the benefits customers receive from new offerings, and discourages carriers from taking pro-consumer actions."[5/] The Commission acknowledges, however, that the one day notice period "would effectively eliminate pre-effective tariff review."[6/] The FCC seeks comments on its proposals and asks "whether any alternative notice period would better serve the public interest."[7/]

As major users of telecommunications services provided by nondominant carriers, the Networks consistently have supported the FCC's efforts to introduce greater competition into the telecommunications marketplace. The Networks generally support most of the FCC's proposals in this proceeding to reduce the regulatory burdens on nondominant carriers. However, the one day

---

[3/] Notice at para. 13.

[4/] Notice at para. 15. See 47 C.F.R. § 61.38(b)(1992).

[5/] Notice at para. 15.

[6/] Notice at para. 17.

[7/] Notice at para. 19. The Notice also proposes to reduce other regulatory burdens on nondominant carriers, such as allowing the carriers to state in their tariffs "either a maximum rate or a range of rates," rather than all rates. Notice at para. 22. Changes also are proposed to give the carriers greater flexibility to choose the form and content of their tariffs. Notice at para. 25.

notice proposal ought to be revised in order to give customers a realistic opportunity to challenge any attempts by carriers to abrogate or alter their contractual commitments to customers.

II. DISCUSSION

As competition in the telecommunications market has developed and accelerated in the past several decades, competing carriers increasingly have entered into individually-negotiated, long-term contractual arrangements with customers to establish the specific rates, terms, and conditions governing their offerings. In fact, the Commission's Competitive Carrier policies were premised in large part on a recognition that in a competitive marketplace, customers and carriers would enter into contractual arrangements that both parties intend to be mutually enforceable.[8/] The Commission found that the use of long-term contractual agreements or service plans between carriers and customers was "a normal response to the competitive forces in the

---

[8/] Policy and Rules Concerning Rates For Competitive Common Carrier Services and Facilities Therefor, Notice of Inquiry and Proposed Rule Making, 77 F.C.C. 2d 308 (1979); First Report and Order, 85 F.C.C. 2d 1 (1980); Further Notice of Proposed Rule Making, 84 F.C.C. 2d 445 (1981); Second Report and Order; 91 F.C.C. 2d 59 (1982), recon. denied, 93 F.C.C. 2d 54 (1983); Second Further Notice of Proposed Rule Making, 47 Fed. Reg. 17,308 (1982); Third Further Notice of Proposed Rule Making, 48 Fed. Reg. 28,282 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 F.C.C. 2d 554 (1983), rev'd and remanded sub nom. AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992); Fourth Further Notice of Proposed Rule Making, 49 Fed. Reg. 11,856 (1984); Fifth Report and Order, 98 F.C.C. 2d 1191 (1984); Sixth Report and Order, 99 F.C.C. 2d 1020 (1985), rev'd and remanded sub nom. MCI v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

marketplace in which these carriers operate."[9/] However, as a result of the "tariff precedence doctrine," which, under existing FCC and judicial precedent, holds that publicly-filed tariffs supersede any provisions contained in an unfiled contract in the event of any inconsistency between the tariff and contractual provision,[10/] users always have been concerned that a carrier might file a tariff revision which, if it were allowed to become effective, would alter or abrogate the terms of an underlying carrier-customer contract. And, raising the same concern, often a tariff embodies a long-term service plan between a carrier and a customer which creates expectations of mutual enforceability, even where there is no separate written carrier-customer contract.

As the Commission recognizes,[11/] a one day notice period is so short that a customer obviously will not become aware of, much

---

[9/] Competitive Carrier, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d at 337. The FCC recently concluded that its policies promoting the use of carrier-customer contractual arrangements have resulted in increasing competition in the interexchange market, leading to cost savings and offerings more specifically tailored to meet the users' needs. See Tariff Filing Requirements for Interstate Common Carriers, Report and Order, 7 FCC Rcd 8072, 8079-80 (1992).

[10/] See, e.g., American Broadcasting Companies, Inc. v. FCC, 643 F.2d 818 (D.C. Cir. 1980) (Tariff revisions which are allowed to become effective supersede any conflicting provisions in an unfiled carrier-customer contract governing the same service); Midwestern Relay Company, 59 FCC 2d 477 (1976) (Rate provision in carrier-customer contract is superseded by a carrier's subsequent tariff filing to increase rates); United Video, Inc., 49 FCC 2d 878 (1974) (Tariffed rate supersedes rate contained in previously executed contract between carrier and customer).

[11/] Notice at para. 17.

less have time to review, a tariff filing that affects the terms of its underlying contract or service plan. Thus, the customer will be unable to challenge those tariffs which propose unilaterally to alter or abrogate the carrier's contractual agreements or long-term service plans. Therefore, to address this situation, the FCC's proposal for a universal one day notice period should be revised in several respects. First, nondominant carriers should be required to "flag" in their transmittal letters those tariff filings which are in any way inconsistent with a contractual agreement or a long-term customer service plan. This requirement would put the FCC and users on notice that such a tariff filing has been made. Second, prior to filing a tariff that is in any way inconsistent with a customer's contractual agreement or a long-term service plan embodied in a tariff, the carrier should be required to deliver advance written notice of the prospective filing to the affected customer. Both of these measures, while imposing only a minimal burden on carriers, will alert customers and the Commission that the carrier is proposing to abrogate or alter the terms of long-term service commitments that were intended to be mutually enforceable.

Once a tariff filing has been identified as affecting an underlying contractual commitment or altering the terms of a long-term service plan embodied in a tariff even if there is no separate contract, the FCC should automatically suspend and investigate such tariff filing. In the more competitive

environment upon which the Commission's policies regarding nondominant carriers are premised, it is difficult to imagine the basis upon which the Commission would find that a tariff proposing to abrogate or alter the terms of a long-term service arrangement does not warrant suspension and investigation.[12/] If the Commission declines to adopt an automatic suspension rule, at a minimum it should retain the current fourteen day notice period. In those situations where a carrier is proposing to alter the terms of a contractual agreement or long-term service plan, a customer needs at least that much time to prepare and file a petition against the tariff. In either case, however, both the "flagging" and advance written notice requirements must be in place so that customers are in a position to protest effectively any tariff filing that is inconsistent with a carrier's commitments.

Finally, after the tariff has been filed and either suspended or subject to, at minimum, a fourteen day notice period, the customer will have an opportunity to demonstrate that the tariff is not "just and reasonable" under the Communications

---

[12/] For example, the FCC has rejected a tariff filing that proposed to alter a provision in a long-term 800 service plan that would have exposed current customers to termination liability charges. AT&T Communications Revisions to Tariff F.C.C. No. 2, 5 FCC Rcd 6777 (1990) ("AT&T Tariff 2 Order"). If tariff rejection was warranted in that situation, certainly an automatic suspension and investigation rule is appropriate for carrier tariff filings proposing to abrogate or alter the terms of long-term service agreements with customers.

Act.[13/] The appropriate test in these circumstances has been articulated in the FCC's RCA American Communications decisions, which dictate that tariff revisions proposing to alter the material terms and conditions of a tariff embodying a long-term service plan may be considered unjust and unreasonable unless the carrier demonstrates "substantial cause for change."[14/] The Commission stated in the RCA decisions that its determination of a carrier's "substantial cause for change" must include consideration of "the legitimate expectations of customers for stability in term arrangements" because the FCC's "statutory responsibilities dictate that we take into account the position of the relying customer in evaluating the reasonableness of the change."[15/] The D.C. Circuit has affirmed that the FCC is authorized to consider customer reliance on the terms of a long-term commitment embodied in a tariff in determining the reasonableness of tariff changes proposed by the carrier.[16/]

[13/] Of course, pursuant to Section 204(a)(1) of the Communications Act, as amended, the burden is on carriers in any investigation to show that the tariff proposal is just and reasonable. 47 U.S.C. § 204(a)(1) (1992).

[14/] 84 FCC 2d 353 (1980), on reconsideration, 86 FCC 2d 1197 (1981), on remand, 94 FCC 2d 1338 (1983), aff'd sub nom., RCA v. FCC, 731 F.2d 996 (D.C. Cir. 1984). See also AT&T Tariff 2 Order, 5 FCC Rcd 6777 (AT&T tariff must be rejected because the carrier failed to meet the "substantial cause for change" test adopted in the RCA decisions).

[15/] 86 FCC 2d at 1201. See also AT&T Tariff 2 Order, 5 FCC Rcd at 6779 (AT&T failed to identify a substantial cause for its proposed superseding tariff filing that "outweighs the existing customers' legitimate expectation of stability....").

[16/] RCA American Communications v. FCC, No. 81-1558, slip op. at 4 (D.C. Cir. July 21, 1982) [684 F.2d 1033 (table)].

Consistent with this precedent, the FCC should make clear that, absent extraordinary circumstances directly affecting the public interest, any tariff filing proposing to abrogate or alter the

CERTIFICATE OF SERVICE

I, Missy Hames, do hereby certify that true and correct copies of the foregoing document, "Comments of ABC and NBC," filed In the Matter of Tariff Filing Requirements for Nondominant Carriers, were served by hand this 29th day of March 1993, on the following:

Chairman James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Sherrie P. Marshall
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commissioner Ervin S. Duggan
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Cheryl A. Tritt
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

James D. Schlichting
Chief, Policy and Program Planning Division
Common Carrier Bureau
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Downtown Copy Center
1141 21st Street, N.W.
Washington, D.C. 20036

Missy Hames

Missy Hames